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No. 91-1222

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM 1991

CALIFORNIA ELECTRIC COMPANY,
A California Corporation,
Petitioner,

VS.

PATRICK BRILEY; MANUEL CADENA; JOHN DION; LELAND KNISLEY; JOSE MUNOZ; ROBERT PAZ; RAYMOND TABER; JOHN WHELPLEY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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January 23, 1992

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QUESTIONS PRESENTED

Does federal labor law preempt a state tort action against an individual union employee based on a violation of state law which sets forth general standards of conduct applicable to all employees under state law?

Does federal labor law completely immunize individual union employees from liability for actions and omissions which were stipulated to have been purely personal, unconcerted and not protected by § 7 of the National Labor Relations Act, 29 U.S.C. § 157?

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No.

In The

Supreme Court of the United States

October Term 1991

CALIFORNIA ELECTRIC COMPANY,
A CALIFORNIA CORPORATION,

Petitioner,

v.

PATRICK BRILEY; MANUEL CADENA; JOHN DION;
LELAND KNISLEY; JOSE MUNOZ; ROBERT PAZ;
RAYMOND TABER; JOHN WHELPLEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit in *California Electric Company, a California Corporation v. Patrick Briley; Manuel Cadena; John Dion; Leland Knisley; Jose Munoz; Robert Paz; Raymond Taber; John Whelpley, and Does 1 through 50.*

OPINIONS BELOW

The amended opinion of the three-judge panel of the Court of Appeals is reported at 939 F.2d 790 (9th

Cir. 1991), and is reproduced in Appendix A, *infra*, A-1 through A-13. The order of the District Court granting Respondents' motion to dismiss is unreported, and is reproduced in Appendix B, *infra*, A-14 through A-34.

JURISDICTION

Judgment of the Court of Appeals for the Ninth Circuit was entered on October 23, 1991. By way of an order dated December 20, 1991, this Court established January 23, 1992 as the due date for the filing of the present petition. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the California Labor Code include §§ 2854 and 2865:

§ 2854. Compensated service; degree of care.
One who, for a good consideration, agrees to serve another, shall perform the service, and shall use ordinary care and diligence therein, so long as he is thus employed.

* * *

§ 2865. Liability for negligence; liability of employer for value of services rendered.
An employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the employer. The employer is liable

to the employee if the service is not gratuitous, for the value of the services only as are properly rendered.

The relevant provision of § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry of affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

The present case involves two important issues: (1) whether the breadth of federal labor law preemption prevents an employer from asserting state tort claims against its unionized employees based on state rules which define general standards of conduct applicable to all employees, and (2) whether the scope of the shield of immunity provided to unionized employees by § 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185 ("LMRA"), extends to actions and omissions which were stipulated to have been purely

personal, unconcerted and not protected by § 7 of the National Labor Relations Act, 29 U.S.C. 157 ("NLRA"). In the instant petition, California Electric Company (hereinafter "California Electric" or the "Company") seeks review of the opinion of the Ninth Circuit panel below affirming a District Court order finding that § 301 preempts state law tort claims arising from voluntary quits by unionized employees for purely personal reasons. Furthermore, California Electric seeks review of the Ninth Circuit's holding that § 301 completely shields individual union members from suits for damages for actions and omissions which were stipulated to have been wholly personal, unconcerted and not protected by § 7 of the NLRA.

FACTS BELOW

Beginning in approximately 1950, Petitioner California Electric provided electrical contracting services on a continuous basis to Basic American Foods, Inc. (hereinafter referred to as "Basic") at its various food processing facilities in the western United States. These services were provided pursuant to a time and materials contract under which Basic controlled all assignments of work and the Company supplied Basic with the requested number of electricians and appropriate materials to perform the necessary work. The electricians who were referred to Basic's King City, California facility were members of Local 234 of the International Brotherhood of Electrical Workers

(hereinafter referred to as "Local 234"). California Electric and Local 234 were parties to a collective bargaining agreement.

On October 9, 1986, the Respondents herein (Patrick Briley, Manuel Cadena, John Dion, Leland Knisley, Jose Munoz, Robert Paz, Raymond Taber and John Whelpley) were Local 234 electricians working for California Electric under the aforementioned time and materials contract with Basic. The parties have entered into a stipulation of facts which provides, in pertinent part, that at approximately 9:30 a.m., on October 9, 1986, each of the respondents abruptly left his employment without notice to California Electric by walking off the assigned job site at Basic. In particular the parties have stipulated that each individual took this action for "purely personal reasons. None of the employees intended his quitting to be part of 'concerted activities' as section 7 of the [NLRA], 29 U.S.C. § 157, defines that term." *California Electric Company v. Patrick Briley, et al.*, 939 F.2d 790, 791 (9th Cir. 1991).

As a direct result of the personal and unconcerted acts of each of the individual employees, California Electric was unable to perform electrical contracting services for Basic, which, immediately thereafter, terminated its time and materials contract with California Electric at the King City facility.

Thereafter, California Electric filed suit in the Superior Court of Monterey County, California alleging four distinct state tort claims against the individual employees: (1) intentional interference with economic relationship; (2) negligent interference with contractual relationship; (3) negligence; and (4) conspiracy. Respondents removed the action to federal court under 28 U.S.C. § 1441(b). Significantly, the contract alleged by California Electric to have been tortiously interfered with in the Superior Court action was the time and materials contract between the Company and Basic. California Electric made no claim that the individual employees breached the collective bargaining agreement between it and Local 234.

Following removal, Respondents filed a motion to dismiss for failure to state a claim upon which relief could be granted. The District Court found in Respondents' favor, ruling that each and all of the Company's claims against its former employees were federal claims preempted by § 301. After recharacterizing California Electric's claims as § 301 claims, the District Court found those claims to be barred by a shield of immunity which protects unionized employees from § 301 damages actions and dismissed the suit with prejudice.

Thereafter, California Electric appealed the ruling of the District Court to the Ninth Circuit and a three-judge panel affirmed. *California Electric*

Company v. Patrick Briley, et al., 939 F.2d 790 (9th Cir. 1991). In upholding the District Court, the panel found that § 301 preempted California Electric's state-law claims because the state court duties set forth in California Labor Code §§ 2854 and 2865 depended "substantially and inextricably" upon consideration of the terms of the collective bargaining agreement between the Company and Local 234. *Id.* at 793. After recharacterizing California Electric's claims against the former employees as federal § 301 claims for breach of the collective bargaining agreement, the panel further found that federal law shields individual union members from liability for suits for damages under § 301, even where it was stipulated that the actions of the union members were purely personal, unconcerted and not protected by § 7 of the NLRA. *Id.* at 793, *citing Salinas Cooling Co. v. Fresh Fruit and Vegetable Workers, Local P-78-A*, 743 F.2d 705, 708 (9th Cir. 1984); *Evangelista v. Inlandboatmen's Union of the Pacific*, 777 F.2d 1390, 1400 (9th Cir. 1985). California Electric's petition for rehearing and suggestion for a hearing en banc was denied.

REASONS FOR GRANTING THE WRIT

I. Introduction.

In finding that the scope of federal labor law preemption extended to Petitioners' state law tort claims, the decision of the Ninth Circuit below either

simply ignores or misapplies well established precedents of this Court. The Ninth Circuit further erred when, deciding an issue of first impression, it found that individual union members are shielded from responsibility for damages actions when they have engaged in conduct which has been stipulated to be purely personal, unprotected and unconcerted within the meaning of § 7 of the NLRA. Contrary to the Ninth Circuit's holding, Petitioner urges the Court to examine this important issue of first impression and find that § 301 does not immunize individual employees from liability absent "concerted activity." The need to clarify an employer's right to maintain a damages action against individual unionized employees who engage in activities which violate law and which are stipulated to have been purely personal, unconcerted and not protected by § 7 of the NLRA constitutes a compelling reason why the present writ of certiorari should be granted.

II. Federal Preemption Of State-Law Claims.

In delimiting the scope of the preemptive effect of the National Labor Relations Act of 1935 and the Labor Management Relations Act of 1947, this Court has established three different types of preemption. The first, or "*Garmon*" preemption, protects the original jurisdiction of the National Labor Relations Board over conduct that is "arguably prohibited" or "arguably protected" by the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). In this

action, the Ninth Circuit correctly found that "[n]one of the employees intended his quitting to be part of 'concerted activities' as section 7 of the National Labor Relations Act ('NLRA'), 29 U.S.C. § 157, defines that term." *California Electric Company*, 939 F.2d at 791. Accordingly, as conceded by Respondents below, *Garmon* type preemption is inapplicable.

The second type of preemption, commonly referred to as "*Machinists*" preemption, precludes causes of action based upon state laws that involve conduct that Congress intended to leave unregulated under the NLRA. *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). In *Machinists*, this Court stated that the purpose of the NLRA is to preempt state law that "'upset[s] the balance of power between labor and management expressed in our national labor policy.'" 427 U.S. at 146 (citation omitted). In the case at bar, the state statutes at issue, California Labor Code §§ 2854 and 2865, are no more than statutes of general application that set forth minimum standards of behavior that must be observed by *all* employees, union and nonunion alike, in the performance of their duties to their employer.

Furthermore, the NLRA has been held by this Court not to prohibit minimal standards imposed by state law, such as those contained in Labor Code §§ 2854 and 2865, which are applied to unionized and nonunionized employers and employees alike. *See*,

e.g., *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 737 (1981). Indeed, in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 720 (1985), this Court recognized that minimum labor standards that affect union and nonunion employees *equally* neither encourage nor discourage the collective bargaining processes that are the subject of the Act. *Id.* at 755. Accordingly, "[w]hen a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the [NLRA]." *Id.* at 757. Here, it cannot be gainsaid that the state laws at issue do not even arguably conflict with the purposes of the NLRA and, indeed, Respondents have solemnly stipulated that their actions were *not* protected by § 7 of the NLRA. Accordingly, the state laws involved herein are not preempted under the *Machinists* doctrine because they neither have any effect on any collective bargaining agreement nor do they in any way interfere with the purposes of the NLRA.

Third and finally, this Court has held that § 301 of the LMRA, 29 U.S.C. § 185, "governs claims founded directly on rights created by collective bargaining agreements, and also claims 'substantially dependent on analysis of a collective bargaining agreement.'" *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987); (citations omitted) *see also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). Crucially, however, in *Caterpillar*, this Court struck a

balance between the "preemptive force of § 301," *Id.* at 394, and the power of state law over disputes arising out of employer-employee relations, stating explicitly that a plaintiff covered by a collective bargaining agreement "is permitted to assert legal rights *independent* of that agreement, including state-law contract rights, *so long as the contract relied on is not a collective bargaining agreement*." *Id.* at 396 (emphasis supplied). Here, the contract upon which California Electric relies in asserting its state-law causes of action is the longstanding time and materials agreement which existed between it and Basic that the Company alleges to have been interfered with, on an individual basis, by each Respondent who quit his employment for purely personal reasons. In this regard, California Electric contends that Basic terminated its time and materials contract with the Company because of each Respondent's individual, negligent, or wrongful interference with that contract.

In these circumstances, it could not be more clear that no breach of any collective bargaining agreement is at issue here. Indeed, one searches the present complaint in vain for any even arguable shred of reliance by California Electric on any collective agreement in asserting its independent state law rights herein. Quite to the contrary, the salient issue here is whether each Respondent's action in quitting for purely personal and unprotected reasons constituted wrongful

conduct sufficient to find liability in tort under the laws of the State of California. As this Court has noted:

> Section 301 does not. . . require that "all employment-related matters involving unionized employees" be resolved through collective bargaining and thus be governed by a federal common law created by section 301. . . . "For instance, a state battery suit growing out of a violent strike would not arise under section 301 simply because a strike may have been a violation of an employer-union contract."

Id. at n.10, *citing Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 25, n.28 (1983).

California Electric respectfully submits that the Ninth Circuit panel below erred when it found that any definition of the statutory duties imposed upon employees by California Labor Code §§ 2854 and 2865 depends "substantially and inextricably" upon consideration of the collective bargaining agreement between California Electric and Local 234. Similar to the claims in *Franchise Tax Board*, California Electric's claims against Respondents herein are grounded *only in state law*. Simply put, California Electric has alleged no more than that the actions of the individual employees violated the minimal employment standards established by California Labor Code §§ 2854 and 2865; which are

non-negotiable state-law duties owed to employers by every employee in California, independent of the employees' union or non-union status.

This Court has clearly held that if it is unnecessary to refer to or interpret the terms of a collective bargaining agreement in order to determine whether elements necessary to prove a violation of a state tort have been met, the state cause of action is not preempted by § 301 and is permitted to go forward. *Lingle v. Norge Division of Magic Chef*, 486 U.S. 399 (1988). The state law claims asserted by Petitioner are precisely the kind of state-law questions contemplated when this Court stated in *Lingle* that: "judges can determine questions of state law involving labor management relations only if such questions do not require construing collective bargaining agreements." *Id.* at 411. It matters not that the actions of the individual employees may also have constituted a violation of the labor agreement between California Electric and Local 234.

Indeed, as noted above, no such violation is even arguably alleged by the Company in the present complaint. Quite to the contrary, what is specifically alleged in the complaint, of which Petitioner is the master, (*Caterpillar*, 482 U.S. at 392), is that the individual Respondents failed as employees to act with the minimal degree of care imposed by the State of California in deciding to terminate their employment,

and that such failure intentionally or negligently interfered with California Electric's time and materials contract with Basic. Therefore, a determination of whether Respondents' interference with the time and materials agreement constitutes a tort under California law may be made without resort to any consideration whatsoever of the wholly irrelevant labor agreement between California Electric and Local 234.[1/] Accordingly, Petitioner respectfully submits that § 301, in no manner, operates to preempt the independent state law claims asserted herein.

III Scope Of Federal Immunity For Individual Union Members

Even assuming, *arguendo*, that somehow California Electric's claims were properly recharacterized by the Ninth Circuit panel below as § 301 claims for breach of a collective bargaining agreement, Petitioner respectfully submits that the panel erroneously extended the scope of immunity provided to individual union members from suits for damages under § 301 to cover actions and omissions which were

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1/ In order to properly plead an action for interference with contractual relations in California, a plaintiff must allege (1) existence of a valid and binding contract; (2) defendants' knowledge of the contract and intention to induce its breach; (3) breach of the contract by the contracting party; (4) that the breach was caused by the defendants' unjustified or wrongful conduct; and (5) the plaintiff has suffered damage. *See, Northridge Hospital Foundation v. Pick 'n Save No. 9, Inc.*, 187 Cal. App. 3d 1088, 1102 (1986).

stipulated to have been purely personal, unconcerted and outside the protection of § 7 of the NLRA. Although this is an issue of first impression for this Court, it appears to be well established that there is no federal immunization under § 301 (or § 303) of the LMRA absent "concerted activity." In *Complete Auto Transit v. Reis*, 451 U.S. 401 (1981), this Court reviewed the legislative history underlying §§ 301 and 303 and noted:

> The House bill also included a provision, however, which *allowed* an employer to recover damages from individual employees. Section 12 created a damages action against *any person* engaging in an unlawful concerted activity. The bill defines "unlawful concerted activities" to include, inter alia, jurisdictional strikes, sympathy strikes, and certain picketing activities.
>
> Significantly, however, the Senate *rejected* the House's imposition in § 12 of damages liability against individuals for unlawful concerted activity, and a Conference Committee adopted the Senate version. The Senate counterpart to § 12 of the House bill was § 303. Senator Taft offered a floor amendment to § 303 which would have established a damages action against *individuals* who engaged in certain types of

> unlawful concerted activity such as secondary boycotts and jurisdictional strikes. 93 Cong. Rec. 4900 (1947). In a critical exchange during the debate on the proposed amendment, Senator Taft offered the language to limit damages actions to claims against *unions*, in order to conform with section 301(b) and bar imposition of individual damages liability against employees[.]

451 U.S. 412-413.

Petitioner respectfully submits that the analysis of the panel below simply fails to comprehend the plain meaning of the legislative history underlying the 1959 Amendments to the LMRA codified in §§ 301 and 303 thereof and the subsequent holding of this Court in *Complete Auto Transit v. Reis*. The clear message of the above-referenced legislative history as interpreted by this Court in *Complete Auto Transit*, is as follows: (a) if an employee's actions may properly be characterized as *lawful concerted activities*, they are likely protected by § 7 of the NLRA; and (b) if the employee's actions were *unlawful* but still *concerted*, they would be protected from individual suits for damages by § 301 (and presumably § 303). However, it could not be more clear that in circumstances such as those extant in the case at bar, where the parties have entered into a solemn stipulation that the actions involved were purely

personal and not concerted as defined in § 7 of the NLRA, *neither* § 7 *nor* § 301 (nor presumably § 303) operates to shield those employees from individual liability for such personal actions and omissions.

Simply stated, the analysis of this issue by the panel below is not in accord with the clear teachings of this Court. Although acknowledging the parties' stipulation that the employees merely quit and that there was no strike, picketing or other concerted activity at Basic's King City facility, the panel then erroneously applied *Complete Auto Transit* and ruled that "'individual union members are immune from suits for damages under section 301 even if their conduct was unauthorized by the union and was in violation of an existing collective bargaining agreement.'" *California Electric*, 939 F.2d at 794, quoting *Evangelista*, 777 F.2d at 1400 (citing *Complete Auto Transit*, 451 U.S. at 417). However, as discussed in detail above, *Complete Auto Transit*, as well as the pertinent legislative history, *requires concerted activity* (either lawful or unlawful) as a condition precedent for invoking § 301 (and § 303) immunity from individual damages actions.[2/] Indeed, the acknowledged,

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2/ As then Chief Justice Burger correctly noted in his dissent in *Complete Auto Transit*: "The special exemption in § 301(b) affords individual union members protection against individual liability for *collective* action; this simultaneously encourages group action through the union -- which is what unions are all about -- and prevents potentially large damages awards against (continued...)

stipulated and undisputed fact that the respondents "simply quit" instead of striking, picketing or engaging in any other type of concerted activity (either lawful or unlawful) absolutely compels a finding that the employees are not immunized from liability for their commission of state torts.[3/]

CONCLUSION

For each and all of the above and foregoing reasons, Petitioner respectfully moves this Court to grant the Petition for Certiorari, summarily vacate the decision of the Ninth Circuit and remand the matter to

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2/(...continued)

individual workers. But when Congress changed the law regarding *individual* liability for *union* conduct, it did not even hint at changing the common-law rule of contract law of *individual* liability for *individual* conduct, which does no more than articulate the basic idea of individual accountability essential to an organized society." *Complete Auto Transit*, 451 U.S. at 426-427 (Burger, C.J., dissenting) (footnote omitted). In the case at bar, Petitioners ask for no more than that Respondents take responsibility for their individual, personal and unconcerted actions.

3/ The Ninth Circuit panel similarly erred when it applied this Court's decision in *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), in attempted support of its decision below. *Atkinson* holds simply that employees cannot be individually liable for violating a collective bargaining agreement. Here the employees are not being sued for breaching a collective bargaining agreement but for violating independent, statutory duties owed by them to California Electric in their working relationship and for unlawfully interfering with the Company's time and materials contract with Basic. Thus, none of the employees is immunized by federal law from the Company's state tort claims.

the District Court for a determination on the merits. Alternatively, Petitioner respectfully moves this Court to grant the Petition and give the case plenary consideration.

DATED: January 23, 1992.

Respectfully submitted,

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APPENDIX A

CALIFORNIA ELECTRIC COMPANY,
a California Corporation,

Plaintiff-Appellant,

v.

PATRICK BRILEY; MANUEL CADENA; JOHN DION; LELAND KNISLEY; JOSE MUNOZ; ROBERT PAZ; RAYMOND TABER; JOHN WHELPLEY; and DOES 1 through 50,

Defendants-Appellees.

No. 88-15365
UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT

Argued and Submitted January 14, 1991.

Decided July 25, 1991.

As Amended September 18, 1991.

Employer brought action against former union employees, claiming that they breached duty under state law when they quit their jobs without notice. The United States District Court for the Northern District of

California, Robert P. Aguilar, J., dismissed, and employer appealed. The Court of Appeals, Tang, Circuit Judge, held that federal labor law preempted employers' claims.

Affirmed.

1. **Federal Courts - 776**

Dismissal of complaint for failure to state claim is reviewed de novo on appeal. Fed.Rules Civ.Proc.Rule 12(b)6, 28 U.S.C.A.

2. **Labor Relations - 45**
States - 18.45

Section 301 of Labor Management Relations Act preempts any state-law cause of action that intertwines with or depends substantially upon consideration of terms of collective bargaining agreement. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

3. **Labor Relations - 45**
States - 18.45

Section 301 of Labor Management Relations Act preempted employer's claim that former union employees breached duties under state law when they quit their jobs without notice, notwithstanding

employer's characterization of statutory duties as non-negotiable and independent of any duty established by collective bargaining agreement; definition of any state statutory duty of ordinary care depended substantially and inextricably on consideration of agreement, and agreement wholly displaced state-law presumption of at-will employment. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185; West's Ann.Cal.Labor Code §§ 2854, 2865, 2922.

4. Labor Relations - 20

State statutory presumption of at-will employment was wholly displaced by collective bargaining agreement. West's Ann.Cal.Labor Code §2922.

5. Labor Relations - 752

Federal labor law shielded individual union members from liability for breach of collective bargaining agreement. Labor Management Relations Act, 1947, § 301, 29 U.S.C.A. § 185.

Robert K. Carrol, Littler, Mendelson, Fastiff & Tichy, San Francisco, Cal., Eric A. Grover, for plaintiff-appellant.

Robert E. Jesienger, Wylie, McBride, Jesienger & Sure, San Jose, Cal., for defendants-appellees.

Appeal from the United States District Court for the Northern District of California.

Before TANG, BOOCHEVER, NOONAN, Circuit Judges.

TANG, Circuit Judge:

California Electric Company sued several of its former union employees for state law tort claims arising from the employees' voluntarily quitting employment. The district court dismissed the claims as preempted under federal labor law. We affirm.

FACTUAL BACKGROUND

The parties stipulated to the following facts before the district court.

From approximately 1950 till October 1986, California Electric provided electrical contracting services to Basic American Foods, Inc. ("Basic") at various Basic facilities. On October 9, 1986, California Electric was performing services for Basic under a "time and materials" contract at Basic's King City, California facility.

On that day, California Electric employed defendant-appellees Patrick Briley, Manual Cadena, John Dion, Leland Knisley, Jose Munoz, Robert Paz, Raymond Taber, and John Whelpley (hereafter, the "employees") at Basic's King City facility. Each of the employees was a member of Local Union 234 of the International Brotherhood of Electric Workers (the "Union"). The Union and California Electric had entered into a collective bargaining agreement.

The employees' usual working hours at Basic's King City facility were 8:00 a.m. to 4:30 p.m. On October 9, 1986, at approximately 9:30 a.m., all of the named employees quit their employment with California Electric by walking off their assigned job sites at Basic. Each employee quit his employment for purely personal reasons. None of the employees intended his quitting to be part of "concerted activities" as section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, defines that term. None of the employees quit because of any belief that he labored under abnormally dangerous working conditions.

None of the employees gave California Electric any advance notice of his intent to quit employment. Except for Patrick Briley, none of the employees notified California Electric that he was quitting when leaving the assigned job site. None of the employees considered what effect his quitting at 9:30 a.m. without notice would have on California Electric's contractual

relationship with Basic. None of the employees sought to prevent an interruption in California Electric's services to Basic caused by his sudden quitting.

The employees' failure to notify California Electric before quitting deprived California Electric of any opportunity to avoid the resulting interruption in services to Basic. As a direct result of the employees' walk-off on October 9, 1986, California Electric was unable to continue performing contract services for Basic. Consequently, Basic terminated its contract with California Electric for service at Basic's King City facility.

PROCEDURAL BACKGROUND

Following the employees' walk-off on October 9, 1986, California Electric filed breach of contract grievances against the Union and the employees. California Electric alleged in these grievances that the Union and the employees had violated the "no-strike clause" of California Electric's collective bargaining agreement with the Union. As of 1988, these grievances were still pending.

California Electric did not file any unfair labor practice complaints with the National Labor Relations Board. Instead, on February 12, 1987, California Electric filed a complaint for damages in federal court pursuant to section 303 of the Labor Management

Relations Act ("LMRA"), 29 U.S.C. § 187(b). The complaint named the Union local and parent organization as defendants. In the complaint, California Electric alleged that it suffered damages as a result of the employees' walk-off. On May 28, 1987, the district court dismissed with-out prejudice the claims against the parent of the Union local.

Subsequently, on July 31, 1987, California Electric filed a complaint against the eight individual employees in Monterey County Superior Court, California. In its complaint against the employees, California Electric alleged four state tort claims: (1) intentional interference with an economic relationship; (2) negligent interference with a contractual relationship; (3) negligence; and (4) conspiracy. California Electric claimed that, because all four torts were done willfully and with malice, it was entitled to punitive damages from each employee.

Defendant employee Raymond Taber removed the action to federal district court on August 24, 1987. Taber claimed that California Electric's action was actually for alleged violations of a collective bargaining agreement. The complaint, Taber argued, thus presented a federal question justifying removal pursuant to 28 U.S.C. § 1441(b).

On January 21, 1988, the eight employees named as defendants moved the district court to dismiss

the complaint against them. The employees argued that, under Federal Rule of Civil Procedure 12(b)(6), California Electric had failed to state a claim upon which relief could be granted. On April 8, 1988, the district court granted the motion and dismissed California Electric's complaint against the employees with prejudice. California Electric timely appeals the judgment.

STANDARD OF REVIEW

[1] We review de novo dismissal of a complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, __ U.S. __, 110 S.Ct. 3217 (1990). Because the parties stipulated to the facts, this appeal involves only issues of law.

DISCUSSION

I. Federal Preemption

[2] Section 301 of the LMRA, 29 U.S.C. § 185, preempts any state law cause of action which is "intertwined with" or depends "substantially" upon consideration of the terms of a collective bargaining agreement. *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863 (9th Cir. 1987), *cert. denied*, 486 U.S. 1054 (1988). "The preemptive force of section 301 is so

powerful as to displace entirely any state cause of action for violation of a collective bargaining agreement." *Id.* at 861. State law claims in the employment context thus are viable only if the alleged state law rights and duties exist independently of the collective bargaining agreement. *Id.* at 863 (citing *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985)). In sum, the "relevant analysis" is whether California Electric's state law claims assert "'nonnegotiable state-law rights [of] employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract.'" *Id.* (quoting *Allis-Chambers*, 471 U.S. at 212).

[3] As torts, California Electric's claims all depend upon the assertion of breached duties. California Electric alleges that California law establishes the breached duties. These statutory duties, California Electric argues, are nonnegotiable state law duties, independent of any duty established by the collective bargaining agreement with the Union. Specifically, California Electric alleges that the former employees owed it a duty of ordinary care pursuant to sections 2854 and 2865 of the California Labor Code.[1/]

1/ Cal.Lab. Code § 2854 provides: "One who, for a good consideration, agrees to serve another, shall perform the service, and shall use ordinary care and diligence therein, so (continued...)

California Electric further alleges that, under section 2922 of the California Labor Code, the former employees specifically owed it a duty not to quit without reasonable notice. Section 2922 of the California Labor Code provides, "An employment, having no specified term, may be terminated at the will of either party on notice to the other."

We conclude that section 301 of the LMRA preempts California Electric's claims because definition of any of these state statutory duties depends substantially and inextricably upon consideration of the parties' collective bargaining agreement.

[4] The California Supreme Court has held that section 2922 creates a presumption of at-will employment. *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 665, 254 Cal. Rptr. 211, 214, 765 P.2d 373, 376 (1988) (in bank). However, "[t]his presumption may be superseded by a contract, express or implied. . . ." *Id.*, 254 Cal. Rptr. at 214, 765 P.2d at 376. In the instant case, the parties' collective bargaining agreement wholly displaces the state law presumption of at-will employment. Consequently, any state law requirement for notice of termination in at-

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1/(...continued)

long as he is thus employed." Cal.Lab. Code § 2865 provides: "An employee who is guilty of a culpable degree of negligence is liable to his employer for the damage thereby caused to the employer."

will employment under section 2922 is inapplicable to this case.

Instead, to determine the former employees' state law rights and duties upon termination, including the scope of any duty of ordinary care under sections 2854 and 2865, resort must be had to the parties' collective bargaining agreement. Even assuming arguendo that the employees owed California Electric some duty of reasonable notice, the collective bargaining agreement defines the parameters of that duty, *see* section 3.06(c) of the collective bargaining agreement. Because California Electric's state law claims thus necessarily depend on consideration of the parties' collective bargaining agreement, § 301 preempts them.

II. Dismissal

[5] We have determined that federal law preempts California Electric's complaint that its former employees breached their duties because the collective bargaining agreement necessarily defines those duties. We therefore recharacterize California Electric's claims against the former employees as federal section 301 claims for breach of the collective bargaining agreement. *See* 29 U.S.C. § 185. Federal law shields individual union members from liability for such actions, however. *See Salinas Cooling Co. v. Fresh Fruit and Vegetable Workers, Local P-78-A*, 743 F.2d 705, 708 (9th Cir. 1984); *Evangelista v.*

Inlandboatmen's Union of the Pacific, 777 F.2d 1390, 1400 (9th Cir. 1985). Accordingly, the district court properly dismissed California Electric's claims against the individual union members.

California Electric contends that this federal shield from liability spreads over only "concerted" union activity. We disagree. As we have previously noted, the Supreme Court has "held that individual union members are immune from suits for damages under section 301 even if their conduct was unauthorized by the union and was in violation of an existing collective bargaining agreement." *Evangelista*, 777 F.2d at 1400 (citing *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401, 417 (1981)). We therefore hold that dismissal was proper. California Electric can pursue its recharacterized breach of contract claims only against the Union and not against its individual members. "The Supreme Court has made clear that the policy that the union should be the sole source of recovery 'cannot be evaded or truncated by the simple device of suing union agents or members, whether in contract or tort . . . in a separate count . . . for damages for violation of a collective bargaining contract . . .'" *Salinas*, 743 F.2d at 708 (emphasis omitted) (quoting *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238, 249 (1962)). California Electric's state law claims against the former employees cannot evade preemption under federal labor law. Federal law governs alleged breaches of the collective bargaining

agreement, and it shields the former employees from liability.

CONCLUSION

Dismissal of California Electric's claims against the former individual defendants is therefore

AFFIRMED.

APPENDIX B

CALIFORNIA ELECTRIC COMPANY, Plaintiff, vs. LOCAL UNION NO. 234 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS OF MONTEREY, SANTA CRUZ AND SAN BENITO COUNTIES, Defendants.	No. C 87-20075 RPA consolidated with ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND GRANTING LEAVE TO AMEND No. C 87-20577 RPA
CALIFORNIA ELECTRIC COMPANY, Plaintiff, vs. PATRICK BRILEY, MANUEL CADENA, JOHN DION, LELAND KNISLEY, JOSE MUNOZ, ROBERT PAZ, RAYMOND TABER, JOHN WHELPLEY, and DOES 1 through 50, Defendants.	

On January 21, 1988, Defendants Patrick Briley, Manuel Cadena, John Dion, Leland Knisley, José Muñoz, Robert Paz, Raymond Taber and John Whelpley ("the Employees") filed a notice of motion and motion to dismiss Plaintiff's Complaint in Case No. C 87-20577 RPA for failure to state a claim for which relief can be granted pursuant to F.R.C.P. 12(b)(6) and, alternatively, for summary judgment pursuant to F.R.C.P. 56.

STIPULATED FACTS

The parties herein have stipulated to the following fats for purposes of this motion only:
Beginning approximately in 1950, and continuing for 37 years until October 9, 1986, Plaintiff California Electric Company ("California") provided electrical contracting services to Basic American Foods, Inc. ("Basic") at its various food processing facilities.
On October 9, 1986, California was performing electrical contracting services for Basic at its King City facility under a time and materials contract. On that day, California employed the Employees at Basic's King City facility. The Employees' normal working hours at Basic's King City facility were 8:00 a.m. - 4:30 p.m.

On October 9, 1986 at approximately 9:30 a.m., the Employees quit their employment with California by walking off their assigned job sites at Basic. Each

of the Employees quit his employment for purely personal reasons and his action was not intended by the Employee to be "concerted activities" as that term is used in § 7 of the Labor Management Relations Act of 1947, 29 U.S.C. § 157. None of the Employees quit his employment with California because of any belief that abnormally dangerous conditions for work existed at his place of employment.

None of the Employees gave any advance notice to California of his intent to quit. Except for Patrick Briley, none of the Employees gave notice to California that he was quitting at the time of his leaving his assigned job site.

None of the Employees considered what effect his quitting work at 9:30 a.m. without notice would have on California's contractual relationship with Basic. None of the Employees took any action to arrange for a replacement worker so that there would be no interruption in California's ability to render its services to Basic. The lack of notice to California by the Employees deprived California of any opportunity to avoid the resulting work interruption.

As a direct result of the Employees' walk-off on October 9, 1986, California was unable to continue performing electrical contracting services for Basic. Consequently, Basic terminated California's time and materials contract at the King City facility.

PROCEDURAL BACKGROUND

Following the Employees' walk-off on October 9, 1986, California filed breach of contract grievances against Local Union No. 234 International Brotherhood of Electrical Workers of Monterey, Santa Cruz and San Benito Counties ("Local 234") and the Employees. California alleged that Local 234 and the Employees had violated the "no-strike clause" (§ 1.04) of the collective bargaining agreement between California and Local 234. These grievances are still pending.

California did not file any unfair labor practices with the National Labor Relations Board. Instead, on February 12, 1987, California filed a complaint for damages ("C 87-20075 RPA") pursuant to § 303 of the Labor Management Relations Act, 29 U.S.C. § 187, against Local 234 and the International Brotherhood of Electrical Workers ("International"). Specifically, California alleged that it suffered damages as a result of the Employees' walk-off -- conduct which it alleged violates §§ 8(b)(4)(i)(B) and 8(b)(4)(ii)(B) and (D) of the Labor Management Relations Act. On May 28, 1987, the Court dismissed the complaint against International without prejudice.

Subsequently, on July 31, 1987, California filed a second complaint against the Employees in Monterey County Superior Court. In its complaint against the

Employees, California alleged four distinct state tort claims:

(1) "intentional interference with economic relationship;" (2) "negligent interference with contractual relationship;" (3) "negligence;" and (4) "conspiracy." California claimed that because all four torts were done wilfully and with malice, it was entitled to punitive damages from each Employee. Defendant Raymond Taber removed the action to this Court on August 24, 1987 ("C 87-20577 RPA"), claiming that the action was for "an alleged violation of a collective bargaining agreement" and thus presented a federal question justifying removal pursuant to 28 U.S.C. § 1441(b).

On December 1, 1987, the Court consolidated C 87-20075 RPA with C 87-20577 RPA for purposes of both discovery and trial pursuant to F.R.C.P. 42(a).

DISCUSSION

Preemption under the National Labor Relations Act of 1935 ("NLRA") and the Labor Management Relations Act of 1947 ("LMRA") occurs in three different contexts. *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 862 (9th Cir. 1987).

First, *Garmon* preemption exists to protect the original jurisdiction of the National Labor Relations

Board ("NLRB") over conduct which is "prohibited or protected" by the NLRA. San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959). If a claim is preempted under *Garmon* analysis, it is the NLRB, not the courts, which has jurisdiction.

The second preemption doctrine "involves state laws and causes of action which concern conduct that Congress intended to be unregulated under the NRLA." *Paige*, 826 F.2d at 862. Because conduct falling under this second preemption doctrine is neither prohibited nor protected under the NLRA, it is not preempted by *Garmon*. *See Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 (1985).

The third and final preemption doctrine arises under § 301 of the LMRA. Section 301 preempts any claim which is based on a collective bargaining agreement or whose outcome is dependent upon an interpretation of the agreement's terms. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985).

A. Inapplicability Of the Garmon Doctrine.

In *Garmon*, 359 U.S. 236 (1959), the Supreme Court held that when an activity is arguably "prohibited or protected" under either § 7 or § 8 of the NLRA, the States as well as the federal courts must defer to the exclusive competence of the NLRB. In addressing the "multitude of activities" regulated by §§ 7 and 8 of the NLRA, the Court noted that "[t]hese broad provisions

govern both protected 'concerted activities' and unfair labor practices." 359 U.S. at 241.

Because the Employees did not engage in unfair labor practices prohibited by the NLRA under § 8 or concerted activities protected by the NLRA under § 7, *Garmon* analysis is not relevant to this case. 29 U.S.C. § 157 (1982). As noted earlier, California has stipulated that the Employees quit their employment "for purely personal reasons" and their actions were not intended to constitute "concerted activities" as that term is used in § 7 of the LMRA. Moreover, California, as master of its complaint, did not allege a violation of its rights under the NLRA, but only violations of state tort law. By foregoing any claim based on federal law, California purposefully chose to plead its action as a bundle of state claims.

B. Conduct Which Congress Intended To Leave Unregulated.

In *Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976), the Supreme Court enunciated yet another aspect of the preemption doctrine. *Machinists* set forth the rule that federal labor law preemption precludes state regulation of conduct which Congress intended to leave unregulated and "controlled by the free play of economic forces." *Id.* at 144.

In *Machinists*, a union and its members engaged in a concerted refusal to work overtime pending negotiations for the renewal of an expired collective bargaining agreement with their employer. The employer filed an unfair labor practice with the Wisconsin Employment Relations Commission which held that such refusal, while neither protected nor prohibited by the NRLA, was an unfair labor practice under state law, and entered a cease-and-desist order against the union.

The U.S. Supreme Court held that the "union's concerted refusal to work overtime was peaceful conduct constituting activity that must be free of state regulation if the congressional intent in enacting the comprehensive federal law of labor relations is not to be frustrated. Congress meant that self-help economic activities, whether of employer or employee, were not to be regulable by States any more than by the NLRB." *Id.* at 132.

More recently, in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986), the Supreme Court had occasion to utilize this principle of federal preemption. In *Golden State*, a taxicab operator's drivers went on strike while the operator's application to renew its franchise to operate taxicabs in the city was pending. The City Council then conditioned renewal of the franchise on settlement of the labor dispute by a certain date. When the dispute was not

settled by that date, the franchise expired. Applying its rule in *Machinists*, the Supreme Court determined that the "NLRA pre-emption principle precluding state and municipal regulation concerning conduct that Congress intended to be unregulated" was applicable, and thus the city's action in conditioning the operator's franchise renewal on the settlement of the labor dispute was preempted by the NLRA.

In the present case, there is no allegation that either the state or a municipality imposed restrictions on the parties' use of economic weapons of self-help. In fact, of the two parties in this action, only the Employees sought to utilize any "economic weapon" -- and this exercise of self-help was clearly unrestricted. As stipulated by the parties herein, the Employees simply quit their employment with California. Moreover, unlike the parties in *Machinists* and *Golden State*, the parties herein did not use their economic weapons of self-help in furtherance of negotiations over the terms of their agreement. Therefore, this second type of preemption is not applicable.

C. Section 301 Preemption.

In determining whether federal law preempts state law, the essential inquiry is the intent of Congress in enacting the federal statute. *Metropolitan Life*, 471 U.S. at 738. Preemption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or

implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

In enacting § 301 of the LMRA, Congress did not state explicitly whether and to what extent it intended to preempt state law. *Allis-Chalmers Corp.*, 471 U.S. at 208. Without express preemption, a state law will not be displaced "'unless it conflicts with federal law or would frustrate the federal scheme, or unless it is apparent from the totality of the circumstances that Congress sought to occupy the field to the exclusion of the states.'" *Id.* at 209 quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

In *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23-24 (1983), the Supreme Court recognized the powerful preemptive force of § 301 in holding that the federal labor law completely displaces any state claim for violation of a collective bargaining agreement and, in such cases, allows the action to be removed to federal court even if an otherwise adequate state claim may exist. Subsequently, in *Caterpillar, Inc. v. Williams*, ____ U.S. ____, ____, 107 S. Ct. 2425, 2431 (1987), the Supreme Court reiterated its determination that § 301 preempts claims founded directly on rights created by collective-bargaining agreements, and also claims which are substantially dependent on analysis of a collective-bargaining agreement.

Even more recently, however, the Ninth Circuit decided a case bearing a substantial similarity to the one at bar. In *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987), two employees brought an action in state court alleging that their employer had required them to fill generators with gasoline under unsafe conditions despite their protests, and that when they refused to do so they were fired. The complaint stated seven causes of action -- (1) wrongful discharge in violation of Cal/OSHA; (2) wrongful discharge in violation of the implied covenant of good faith and fair dealing; (3) intentional infliction of emotional distress; (4) negligent infliction of emotional distress; (5) assault; (6) peculiar risk; and (7) ultrahazardous activities.

Upon removal, the district court had held that federal jurisdiction existed because the two wrongful discharge actions, although artfully pleaded as state torts, were, in fact, claims for breach of the collective bargaining agreement between Kaiser and the employees' union, and thus were preempted by § 301. The remaining state claims were remanded to state court.

Upon appeal, the Ninth Circuit first determined that the wrongful discharge claim based on breach of the implied covenant of good faith and fair dealing was based on rights created by the collective bargaining agreement and was thus preempted by § 301. In

considering the second wrongful discharge claim based on Cal/OSHA, however, the court determined that because the state's "OSHA regulations protect all workers, irrespective of any labor agreement," the claim was "not intertwined or substantially dependent upon consideration of the terms of the labor contract" and was thus not preempted by § 301. *Paige*, 826 F.2d at 863.

As the Ninth Circuit recognized in *Paige*, § 301 preempts any action which is based on a collective bargaining agreement or whose outcome is dependent upon an interpretation of the agreement's terms. However, "not every dispute concerning employment, or tangentially involving a provision of a collective bargaining agreement, is pre-empted by section 301 or other provisions of the federal labor law." *Allis-Chalmers*, 471 U.S. at 211. Congress did not intend for § 301 to preempt "state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Id.* at 212. Indeed, the relevant analysis is whether the California tort action "as applied here confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, *whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract*. If the state tort law purports to define the meaning of the contract relationship, that law is pre-empted." *Id.* at 213 (emphasis added).

As noted earlier, California's complaint against the Employees sets forth four state tort claims: (1) intentional interference with economic relationship; (2) negligent interference with economic relationship; (3) negligence; and (4) conspiracy.

California argues that the Employees violated "their obligations as employees to their employer," either wilfully or negligently, by quitting their employment without notice in the middle of the day. California contends that these "obligations" are not dependent on any collective bargaining agreement between itself and Local 234, but rather arise under state statutes. Specifically, California argues that California Labor Code §§ 2854, 2865 and 2922 impose a duty upon the Employees not to "quit in such a manner as would reasonably injure their employer." California alleges that because the Employees' actions in quitting without notice were unreasonable, they are liable for the resulting damage.

Unfortunately, California is mistaken. The state labor code sections cited by California do not establish state rules that proscribe conduct, or establish rights and obligations, independent of the collective bargaining agreement in this case. The four claims against the Employees are either based directly on rights created by the collective bargaining agreement between California and Local 234 or are dependent upon an interpretation of the agreement's terms and

conditions. California's state tort claims are no more than recharacterizations of its grievances against Local 234 and the Employees (see page 3). In essence, California's claims are federal claims "dressed up in state law clothes."

1. Intentional Interference With Economic Relationship.

California alleges that the walk-off on October 9, 1986 was intended by the Employees to induce Basic to cancel its contract with California. The "economic relationship" allegedly interfered with in this case refers to the contractual relationship between California and Basic. That relationship flows directly from the collective bargaining agreement between the two parties. Indeed, the collective bargaining agreement creates the relationship. In determining whether the Employees intentionally interfered with the parties' economic relationship, the Court must necessarily examine the substance of the relationship. Because this requires an examination of the collective bargaining agreement, this first claim is clearly "inextricably intertwined" with consideration of the terms of the collective bargaining agreement.

2. Negligent Interference With Contractual Relationship.

California contends that the Employees knew, or should have known, that their conduct would cause Basic to cancel its contract with California. Again, in

determining whether the Employees negligently interfered with the parties' contractual relationship, the Court must consider the basis of that relationship, namely, the contract. Therefore, this claim is also "inextricably intertwined" with consideration of the terms and conditions of the collective bargaining agreement.

3. Negligence.

California's third claim alleges negligence on the part of the Employees. In evaluating the nature of any duties owed by the Employees to California, the Court must necessarily consider the Employees' duties under the terms and conditions of the collective bargaining agreement in order to determine whether or not that agreement, and the duties created thereby, were intended to define entirely the parties' relationship.

4. Conspiracy.

California alleges that the Employees engaged in a conspiracy to damage California by inducing Basic to terminate its contract with California. First, based on the stipulated facts, no reasonable jury could find that the Employees were engaged in a conspiracy. As stipulated, the Employees quit their employment for purely personal reasons and their actions were not intended to be "concerted activities." Second, in discerning the damage suffered by California as a result of any alleged conspiracy, an evaluation of the terms

and conditions of the collective bargaining agreement would be required.

Each of California's claims against the Employees is a tort. In order to be liable for tort damages, the Employees must be under a duty. In this case, any duties owing from the Employees to California stemmed directly from the terms and conditions of the collective bargaining agreement between California and Local 234. At the very least, any duty owed by the Employees implicates the collective bargaining agreement. California, however, contends that the Employees' duty not to quit in an unreasonable manner flows from state labor statutes. However, the statutes cited by California pertain to at-will contracts. No such contract existed in this case. In this case, the terms and conditions of the collective bargaining agreement were to encompass the entirety of the parties' employment relationship. Therefore, were the employees to owe California a duty stemming from the state labor statutes clearly there would be an intrusion into the terms and conditions of the collective bargaining agreement. In the final analysis, any evaluation of California's state tort claims against the Employees is "inextricably intertwined" with consideration of the terms of the collective bargaining agreement.

D. Federal Removal Jurisdiction.

The "well-pleaded complaint rule" provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *See Gully v. First National Bank*, 299 U.S. 109, 112-113 (1936). As a result, the plaintiff, as "master of the claim," may often avoid federal jurisdiction by relying exclusively on state law.

Nonetheless, a plaintiff may not avoid federal jurisdiction by omitting from his complaint allegations of federal law that are essential to the establishment of his claim. A complaint that does so has been characterized as an "artfully-pleaded" complaint. The courts recharacterize the "artfully-pleaded" complaint as though it had been "well-pleaded." *Olguin v. Inspiration Consol. Copper Co.*, 740 F.2d 1468, 1471-72 (9th Cir. 1984); *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367, 1370 (9th cir. 1984), *cert. denied*, 471 U.S. 1099 (1985).

California's four claims, although "artfully pleaded" as state torts, are, in fact, claims for breach of the collective bargaining agreement between California and Local 234. Once recharacterized as "well-pleaded" claims, it is clear that each is preempted

by § 301 of the LMRA.[1/] For this reason, federal jurisdiction exists in this case.

E. Dismissal Of The Employees.

Having determined that California's "artfully-pleaded" claims are preempted by § 301 of the LMRA, it becomes clear that these claims against the Employees must be dismissed.

In *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), the Supreme Court held that § 301(a) of the LMRA does not authorize a damages action against individual union officers and members when their union is liable for violating a no-strike clause in a collective bargaining agreement.

At that time, the Court expressly reserved the question of whether an employer might maintain a suit for damages against "individual defendants acting not in behalf of the union but in their personal and nonunion capacity" where their "unauthorized, individual action" violated the no strike provision of the collective bargaining agreement. 370 U.S. at 249, n. 7.

1/ Section 301 of the L.M.R.A. provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. § 185(a).

In *Complete Auto Transit v. Reis*, 451 U.S. 401 (1981), the Supreme Court addressed this question. The court determined that Congress intended "to shield individual employees from liability for damages arising from their breach of the no-strike clause of a collective bargaining agreement, whether or not the union participated in or authorized the illegality. Indeed, Congress intended this result even though it might leave the employer unable to recover for his losses." *Id.* at 407-408.

In discussing the legislative history of § 301, the Court acknowledged that the Senate Conference Committee had "preferred discharge as the employer's remedy under § 301 where employees violate the no-strike provision of their collective bargaining agreement." *Id.* at 415. The Court went on to state that "while § 301(b) explicitly addresses only union-authorized violations of a collective bargaining agreement, the 'penumbra' of § 301(b), as informed by its legislative history, establishes that Congress meant to exclude individual strikers from damages liability, whether or not that they were authorized by their union to strike. . . . Congress deliberately chose to allow a damages remedy for breach of the no-strike provision of a collective bargaining agreement only against *unions*, not *individuals*, and, as to unions, only when they participated in or authorized the strike." *Id.* at 415-416 (emphasis in original).

Subsequently, in *Salinas Cooling Co. v. Fresh Fruit & Vegetable Workers*, 743 F.2d 705 (9th Cir. 1984), the Ninth Circuit affirmed a district court's dismissal of a trespass claim against individual union members because the claim arose out of the alleged breach of a collective bargaining agreement.

In *Salinas*, the plaintiff contended that its trespass claim against individual union members was a separate state court action which was not preempted by § 301 of the LMRA. In affirming the district court's depiction of the plaintiff's claim against the individual defendants as "federal claims dressed up in state law clothes," the Ninth Circuit recognized that "the policy that the union should be the sole source of recovery 'cannot be evaded or truncated by the simple device of suing union agents or members, *whether in contract or tort*. . . in a separate count. . . for damages for violation of a collective bargaining agreement. . . .'" 743 F.2d at 708, *quoting Atkinson v. Sinclair Refining Co.*, 370 U.S. at 249 (emphasis in original).

The holdings in *Complete Auto* and *Salinas* argue strongly in favor of dismissing the complaints against the Employees. As stipulated by the parties, the Employees merely quit their employment. No strike or other "concerted activities" occurred at Basic's King City facility. As expressed by defendant Raymond Taber, the Employees simply exercised their "God-given right to quit work when [they felt] like it."

Assuming, *arguendo*, that the Employees' conduct had constituted a strike, either with or without the union's approval, it is clear that they could not be held individually liable for their action. The fact that the Employees simply quit their employment rather than striking argues strongly in favor of dismissal of the claims against them.

CONCLUSION AND ORDER

First, the Court hereby recharacterizes California's four "artfully-pleaded" state tort claims against the Employees as federal claims. Second, the Court hereby finds that each of the claims is preempted by § 301 of the Labor Management Relation Act since consideration of the claims is "inextricably intertwined" with consideration of the terms of the collective bargaining agreement between California and Local 234. Third, the Court hereby DISMISSES the claims against the Employees with prejudice and GRANTS California thirty days leave to amend its § 303 complaint, C 87-20075 RPA, against Local 234. Finally, the Court hereby DISMISSES DOES 1 through 50. Further Status conference is set for Friday, July 8, 1988 at 10:30 a.m.

IT IS SO ORDERED.
DATED: April 8, 1988

/s/ Robert P. Aguilar
ROBERT P. AGUILAR
United States District Judge

Supreme Court, U.S.
FILED
FEB 24 1992
OFFICE OF THE CLERK

91-1222

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

CALIFORNIA ELECTRIC COMPANY,
A California Corporation,
Petitioner,

VS.

PATRICK BRILEY; MANUEL CADENA; JOHN DION;
LELAND KNISLEY; JOSE MUNOZ; ROBERT PAZ;
RAYMOND TABER; JOHN WHELPLEY
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Respondents disagree with Petitioner's presentation of the questions. The correct statement of the questions presented are the following:

Does federal labor law preempt a state tort action against individual union employees based on a violation of state law which is intertwined with or depends substantially upon consideration of the terms of the collective bargaining agreement under which the employees perform work?

Does federal labor law immunize individual union employees from liability for a breach of the collective bargaining agreement?

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Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 212 (1985) . .

Complete Auto Transit v. Reis, 451 U.S. 401, 417 (1981) . .

Foley v. Interactive Data Corp., 47 Cal.3d 654, 254 Cal.Rptr. 211, 214, 765 P.2d. 373, 376 (1988) . . . . . .

Lingle v. Norge Division of Magic Chef, Inc., 486 U.S. 399 (1988) . . . . . .

Statutes

29 U.S.C. § 158(b)(4)(i)(B) and (D); 29 U.S.C. § (b)(4)(ii)(B) and (D); Section 8(b)(4)(i)(B) and (D), 8(b)(4)(ii)(B) and (D) of the Labor-Management Relations Act . . . . . .

29 U.S.C. § 185, Section 301 of the Labor Management Relations Act of 1947 . . . . . .

29 U.S.C. § 187, section 303 of the LMRA . . . . . .

29 U.S.C. § 158, Section 7 of the National Labor Relations Act . . . . . .

California Labor Code section 2922 . . . . . .

California Labor Code sections 2854 . . . . . .

California Labor Code sections 2865 . . . . . .

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

CALIFORNIA ELECTRIC COMPANY,
A California Corporation,
Petitioner,

VS.

PATRICK BRILEY; MANUEL CADENA; JOHN DION;
LELAND KNISLEY; JOSE MUNOZ; ROBERT PAZ;
RAYMOND TABER; JOHN WHELPLEY
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Respondents respectfully request the Court to deny the Petition for Writ of Certiorari to review the opinion and judgment of the United States Court of Appeal for the Ninth Circuit in *California Electric Company, a California Corporation v. Patrick Briley; Manual Cadena; John Dion; Leland Knisley; Jose Munoz; Robert Paz; Raymond Taber; John Whelpley, and Does 1 through 50.*

STATUTORY PROVISIONS INVOLVED

Petitioner has omitted a relevant provision of the California Labor Code. That statute is California Labor Code section 2922, which reads as follows:

> Section 2922.
>
> An employment, having no specified term, may be terminated at the will of either party on notice to the other.

STATEMENT OF THE CASE

The present case presents no important issues for consideration by the Court. This case involves state law tort claims, the evaluation of which is inextricably intertwined with consideration of the terms of a collective bargaining agreement and is therefor preempted by Section 301 of the Labor Management Relations Act of 1947 (hereafter "LMRA"), 29 U.S.C. § 185. Furthermore, federal law shields individual union members from liability for breaches of the collective bargaining agreement. The Ninth Circuit followed well-established precedent of this Court in holding that Section 301 preempts the state law causes of action and in dismissing the action against individual union members.

FACTS BELOW

Petitioner fails to mention the following pertinent facts. For several years, Petitioner had been party to a collective bargaining agreement with the International Brotherhood of Electrical Workers, Local Union No. 234 (hereafter "Local 234"). Respondents were California Electric Company employees working under the terms of that agreement. The collective bargaining agreement contained a no-strike provision (¶ 1.04); a provision for grounds for termination (¶ 2.05); and a provision for quitting employment and notice thereof by the employee to the employer (¶ 3.06(c)). (See Appendix "A").

On October 9, 1986, Respondents walked off the job and quit their employment with California Electric Company. This walk off occurred in the context of a long-standing dispute over job assignments. Petitioner had a time and materials contract to provide electrical construction services to Basic American Foods, Inc. (hereinafter "Basic"). Local 234 members were employed by Petitioner to provide electrical services to Basic. However, Basic also assigned electrical work to its electrician employees represented by the International Brotherhood of Teamsters, as well as employees of other outside contractors. Local 234 members had a long standing dispute over these assignments.

After Respondents walked off their jobs on October 9, 1986, Petitioner filed breach of contract grievances against the Union

and the employees, alleging that the Union and the employees had violated the no-strike clause of the collective bargaining agreement. These grievances are still pending.

Petitioner did not file any unfair labor practice charges with the National Labor Relations Board. Instead, on February 12, 1987, Petitioner filed a lawsuit in federal court against Local 234 and the International union pursuant to Section 303 of the LMRA, 29 U.S.C. § 187. The complaint alleged that Petitioner suffered damages as a result of the walk-off and that Local 234, the International Union and its agents (Respondents and others) violated Section 8(b)(4)(i)(B) and (D), and 8(b)(4)(ii)(B) and (D) of the Labor-Management Relations Act, as amended, 29 U.S.C. § 158(b)(4)(i)(B) and (D); 29 U.S.C. § 158(b)(4)(ii)(B) and (D).

On May 28, 1987, the district court dismissed the complaint without prejudice. Subsequently on July 31, 1987, Petitioner filed this complaint alleging state tort claims against Respondents in state court. Petitioner alleged that Respondents owed Petitioner a duty of ordinary care under California Labor Code sections 2854 and 2865. Petitioner also alleged that Respondents specifically owed Petitioner a duty not to quit without reasonable notice under California Labor Code section 2922. Respondents removed the action to federal district court.

In upholding the district courts' dismissal of the complaint, the Ninth Circuit concluded that Section 301 of the LMRA preempts Petitioner's claims because definition of any of the state statutory duties set forth in California Labor Code Section 2922, as well as Sections 2854 and 2865, depended substantially and inextricably upon consideration of the collective bargaining agreement. The Ninth Circuit also held that Respondents were immune from liability under Section 301 of the LMRA.

ARGUMENT

I

SUMMARY

The Ninth Circuit followed well-established precedent of this Court in holding that Section 301 preempts Petitioner's state law tort claims. The state statutes involved are applicable to cases of at-will employment and are thus superseded by the collective bargaining agreement. Determination of any state statutory duty depends upon consideration of the labor agreement. Furthermore, the Ninth Circuit followed well-established precedent of this Court in holding that federal law shields individual union members from liability for breaches of the collective bargaining agreement, where their actions are unauthorized by the agreement and unprotected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 158.

II

FEDERAL PREEMPTION OF STATE LAW CLAIMS

As the Ninth Circuit held, Section 301 of the LMRA preempts any state law cause of action where the "evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985); *Lingle v. Norge Division of Magic Chef, Inc.*, 486 U.S. 399 (1988). In this case, the state tort claims were dependent on an analysis of the collective bargaining agreement. In scrutinizing the state statutes asserted by Petitioner, the Ninth Circuit reasoned that California Labor Code section 2922 creates a presumption of at-will employment; however that presumption may be superseded by contract. *Foley v.Interactive Data Corp.*, 47 Cal.3d 654, 254 Cal.Rptr. 211, 214, 765 P.2d. 373, 376 (1988). Thus, the collective bargaining agreement displaced the statutory presumption of at-will employment; any requirement of Labor Code Section 2922 for notice of termination is therefore inapplicable. Analysis of the employee's duties upon termination under state statutes, including the duty of care under the Labor Code sections 2854 and 2865, must depend upon interpretation of the

labor contract, which in fact includes termination provisions in ¶ 3.06(c).

As the Ninth Circuit made clear, the Labor Code sections cited by Petitioner do *not* impose "minimal standards" to be "applied to unionized and non-unionized employees alike," as Petitioner asserts. Petitioner's basic argument is that § 301 should not have preemptive force because Petitioner's complaint alleged state law claims, rather than breach of labor contract claims. Under Petitioner's argument, tailoring a complaint to omit any reference to a collective bargaining agreement would preclude preemption under § 301. That is not the intent of the preemption principle. The court must look beyond artful framing of the complaint to determine whether evaluation of the state claims is inextricably intertwined with consideration of the labor contract. *Allis-Chalmers Corp. v. Lueck, supra*, 471 U.S. at 212. The labor contract in this case included a no-strike provision, a termination provision, and a provision for quitting employment and for notice to the employer. Thus, these claims were intertwined with the contract and were therefore preempted under Section 301 of the LMRA.

III

FEDERAL LABOR LAW SHIELDS INDIVIDUAL UNION MEMBERS FROM LIABILITY FOR DAMAGES UNDER SECTION 301 OF THE LMRA

The Supreme Court has held that individual union members "acting not in behalf of the union but in their *personal and nonunion capacity*" are immune from suits for damages under § 301 even if their conduct was unauthorized by the union and in violation of a collective bargaining agreement. *Complete Auto Transit v. Reis*, 451 U.S. 401, 417 (1981). Petitioner attempts to distinguish *Complete Auto Transit* from the case at hand by asserting that § 301 and § 303 requires "concerted activity" in order to invoke immunity for individuals from damage actions. There is no such requirement under federal labor law, and no logic to Petitioner's argument. Clearly, if only *one* employee took an unauthorized action against the employer and walked off the job, that action would not constitute "concerted activity," but

would still be immune from liability under *Complete Auto Transit*.

Petitioner's argument regarding immunity is simply another attempt to argue that its state law claims should not be *pre-empted*. Petitioner does not argue that Respondents should be liable for violations *of the collective bargaining agreement*, but rather insists that they "should not be immunized for their *commission of state torts*." Petitioner's Brief, p.18 (emphasis added). This argument has already been addressed and disposed of in the argument on preemption.

CONCLUSION

For all the foregoing reasons, Respondents respectfully request the Court to deny the Petition for Writ of Certiorari.

Dated: February 20, 1992

Respectfully submitted,

WYLIE, MCBRIDE, JESINGER SURE & PLATTEN

Robert E. Jesinger, Counsel of Record

Attorneys for Respondents Patrick Briley, et al.

APPENDIX "A"

FROM INSIDE AGREEMENT BETWEEN IBEW LOCAL UNION NO. 234 AND MONTEREY BAY CALIFORNIA CHAPTER N.E.C.A., INC.

1.04 There shall be no stoppage of work either by strike or lockout because of any proposed changes in this Agreement or dispute over matters relating to this Agreement. All such matters must be handled as stated herein.

2.05 Management Rights. The Union understands the Employer is responsible to perform the work required by the owner. The Employer shall therefore have no restrictions, except those specifically provided for in this collective bargaining Agreement in planning, directing, and controlling the operation of all his work; in deciding the number and kind of Employees to properly perform the work; in hiring and laying off Employees; in transferring Employees from job to job within the local union's geographical jurisdiction; in determining the need and number as well as the person who will act as foreman; in requiring all Employees to observe the Employer's and/or owner's rules and regulations not inconsistent with this Agreement; in requiring all Employees to observe all safety regulations; and in discharging Employees for proper cause.

3.06 Payday—Termination Slips.

(c) 1. If an Employee provides seventy-two hours prior notice of his intention to quit, the Employee is entitled to his wages at the time of quitting.

2. In the event an Employee quits without prior notification, the Employer shall pay all wage due within seventy-two (72) hours or the next payday whichever occurs first. The check shall be mailed to the address provided by the Employee unless other arrangements are agreed upon with the Employee, however, the intent of this section shall not be abrogated or ignored.

Supreme Court, U.S.
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No. 91-1222

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OCTOBER TERM 1991

CALIFORNIA ELECTRIC COMPANY,
A California Corporation,
Petitioner,

VS.

PATRICK BRILEY; MANUEL CADENA; JOHN DION; LELAND KNISLEY; JOSE MUNOZ; ROBERT PAZ; RAYMOND TABEK; JOHN WHELPLEY,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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March 16, 1992

QUESTIONS PRESENTED

Does federal labor law preempt a state tort action against an individual union employee based on a violation of state law which sets forth general standards of conduct applicable to all employees under state law?

Does federal labor law completely immunize individual union employees from liability for actions and omissions which were stipulated to have been purely personal, unconcerted and not protected by § 7 of the National Labor Relations Act, 29 U.S.C. § 157?

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No. 91-1222

In The

Supreme Court of the United States

October Term 1991

CALIFORNIA ELECTRIC COMPANY,
A CALIFORNIA CORPORATION,

Petitioner,

v.

PATRICK BRILEY; MANUEL CADENA; JOHN DION;
LELAND KNISLEY; JOSE MUNOZ; ROBERT PAZ;
RAYMOND TABER; JOHN WHELPLEY,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

I

INTRODUCTION

In accordance with Rule 15.6, Rules of the Supreme Court of the United States, Petitioner California Electric Company, a California corporation ("Petitioner"), hereby submits its reply to arguments first raised in Respondents' opposition brief. In their opposition brief, Respondents proffer several irrelevant arguments, both factual and legal, in an apparent attempt to divert the Court's attention from the stipulated, and, indeed, conclusive fact that the actions of the individual

Respondents in quitting their employment with Petitioner were personal and not concerted activity. Thus, neither § 7 nor § 301 (nor presumably § 303) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, et seq., operates to preempt or immunize the employees from individual state tort liability for their actions and omissions.

II

ARGUMENT

A. Respondents Improperly Rely On "Facts" Not Part Of The Record Below.

As a threshold matter, Respondents improperly make reference to, and include as Appendix A to their opposition, portions of the collective bargaining agreement between Petitioner and International Brotherhood of Electrical Workers, Local Union No. 234 (Respondents' Opp. Brf., p. 2). The collective bargaining agreement between Petitioner and IBEW Local 234 is not properly part of the record below, and any reference thereto should, therefore, be ignored by the Court.

Moreover, even if it were properly a part of the record below, that agreement is irrelevant to the present action because Petitioner has made no claim that the individual employees breached the collective bargaining agreement between it and IBEW Local 234 in quitting their employment for purely personal reasons. Indeed, the only contract with which Respondents' stipulated individual conduct interfered was the "time and

materials" contract between Petitioner and Basic American Foods, Inc., and not any collective bargaining agreement.

Similarly, Respondents' fact statement claims that Respondents quit their employment with Petitioner in the context of a long-standing dispute over job assignments between IBEW Local 234 members and electricians employed directly by Basic and who were represented by the International Brotherhood of Teamsters. Not only are these "facts" not part of the record below, they directly contradict the solemn stipulation of each Respondent that his individual quit was for purely personal reasons and that no employee intended his quitting to be "concerted activity" pursuant to § 7 of the NLRA. In these circumstances, Petitioner urges the Court to ignore Respondents' spurious attempt to improperly introduce facts which are not part of the record below, and, further, which are irrelevant in light of the parties stipulation.

B. The Scope Of California Labor Code §§ 2854 and 2865 Is Not Limited To At-Will Employees.

Respondents also attempt to bootstrap their opposition by making the legal argument that the state statutes at issue herein apply only to cases of at-will employment and are thus superseded by the collective bargaining agreement between Petitioner and IBEW Local 234. Not only are Respondents' arguments legally flawed but Petitioner in no manner relied upon

California Labor Code § 2922 in support of the questions presented in the instant Petition.

Petitioner does not in any way dispute that California Labor Code § 2922 relates to the concept of at-will employment; however, neither California Labor Code § 2854 nor § 2865 makes any mention of or reference to California Labor Code § 2922 or the concept of at-will employment. Quite to the contrary, the above-referenced statutes explicitly incorporate their application to include all "employees for consideration." Id. Accordingly, Respondents' wholly unsupported interpretation that California Labor Code §§ 2854 and 2865 apply only to at-will employees should be rejected by this Court.

Indeed, if one follows Respondents' argument through to its "logical" conclusion, the entire California Labor Code would have to be found to apply to at-will employees only. Thus, for example, only at-will employees in California would be permitted to take advantage of the state's workers' compensation benefits scheme. Cal. Lab. Code § 3600, et seq. Such a finding would, of course, be absurd. The statutorily mandated duties set forth in §§ 2854 and 2865 are clearly applicable to all employees in the state of California regardless of the nature of the employer/employee relationship. Accordingly, this sophistic argument should be rejected by the Court.

III

CONCLUSION

For each and all of the above and foregoing reasons, and for the reasons set forth in California Electric Company's Petition for Writ of Certiorari, Petitioner respectfully moves this Court to grant the Petition for Writ of Certiorari, summarily vacate the decision of the Ninth Circuit, and remand the matter to the District Court for a determination on the merits.

Alternatively, Petitioner respectfully moves this Court to grant the Petition and give the plenary consideration.

DATED: March 16, 1992.

Respectfully submitted,

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